

ORDERED.



Dated: May 11, 2010

*Eileen W. Hollowell*

EILEEN W. HOLLOWELL  
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re:

ALBERTO GONZALEZ MARRUFO  
and BETTY MARTINEZ MARRUFO,  
Debtors.

Chapter 7

Case No. 4:09-bk-08677-EWH

THE HUNTINGTON NATIONAL BANK,  
Plaintiff,

Adv. No. 4:09-ap-00903-EWH

v.

ALBERTO GONZALEZ MARRUFO  
and BETTY MARTINEZ MARRUFO,  
Defendants.

**MEMORANDUM DECISION**

**I. INTRODUCTION**

Joint debtors, husband and wife, incurred a contractual community obligation to a creditor when they leased a vehicle. After several months of making payments, the husband tendered a check to the creditor which released its lien on the vehicle before the creditor learned that the check was a fake. For the reasons explained below, the

1 creditor is entitled to a nondischargeable judgment against the husband but not against  
2 the community property of the debtors nor against the wife's sole and separate property.  
3

## 4 5 II. STATEMENT OF JURISDICTION

6 The court has jurisdiction under 28 U.S.C. § 1334(a) and § 157(b)(2)(I).  
7

## 8 9 III. PROCEDURAL HISTORY

10 Alberto Gonzalez Marrufo ("Mr. Marrufo") and his wife, Betty Martinez Marrufo  
11 ("Mrs. Marrufo") (collectively ""Debtors"), filed a pro se Chapter 7 petition on April 28,  
12 2009. On August 6, 2009, an order was entered granting the Chapter 7 Trustee's  
13 request to delay the entry of the Debtors' discharge and to extend the time for the  
14 Trustee to file an 11 U.S.C. § 727 complaint objecting to the discharge until the Trustee  
15 notified the court that the Debtors had fully complied with all of the Trustee's requests or  
16 until the Trustee filed a report of no distribution. As of the date of this decision, the  
17 Trustee has not filed either notice, so the Debtors have not received a discharge.  
18

19 On August 7, 2009, The Huntington National Bank ("Huntington") filed a  
20 nondischargeability complaint ("Complaint") seeking to deny the Debtors' discharge  
21 under 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6).<sup>1</sup> On September 22, 2009, the Debtors  
22 filed a Motion to Dismiss the Complaint ("MTD") alleging that Huntington lacked  
23 standing to sue the Debtors because it had not demonstrated that there was a note from  
24

---

25  
26 <sup>1</sup> Unless otherwise indicated, all chapter, section, and rule references are to the  
27 Bankruptcy Code, 11 U.S.C. § 101-1532, and to the Federal Rules of Bankruptcy Procedure,  
Rules 1001-9037.

1 the Debtors to Huntington. Debtors also alleged, generally, that Huntington and its law  
2 firm were engaged in a "debt collection racket."

3 On October 2, 2009, Huntington filed a response to the MTD and a motion for  
4 summary judgment ("MSJ"). At a November 10, 2009, hearing, both the MTD and MSJ  
5 were denied. On that same date, a pretrial scheduling conference was held trial was  
6 set for January 25, 2010. During the pretrial scheduling conference, the Debtors were  
7 informed that they would have to comply with all of the rules of civil procedure in  
8 defending against the Complaint. On November 13, 2009, the court issued its standard  
9 pretrial scheduling order, setting specific deadlines for disclosures and the filing of  
10 witnesses and exhibits lists.<sup>2</sup>

11  
12  
13 Huntington served discovery on the Debtors, including thirty one requests for  
14 admissions. Debtors' responses were due on or before December 19, 2009. Instead of  
15 responding to the requests for admissions, the Debtors stamped "paid in full" on each  
16 page of the requests and returned them to Huntington. On December 1, 2009,  
17 Huntington filed a Motion to Compel proper responses. Debtors did not respond to the  
18 Motion to Compel. On December 11, 2009, an order was entered requiring the Debtors  
19 to respond to all outstanding discovery requests by December 19, 2009. The Debtors  
20 did not respond. On December 28, 2009, Huntington filed a Motion for Order that  
21 Matters be Deemed Admitted ("Admissions Motion").  
22  
23  
24  
25

---

26 <sup>2</sup> All discovery was to be completed thirty days before trial; disclosure of witnesses and  
27 exhibits was to be disclosed no later than fourteen days before trial; and joint pretrial statement  
28 was to be filed five days before trial.

1 The deadline for the parties to file their pretrial statements was January 20, 2010,  
2 and the deadline for the parties to file their list of witnesses and exhibits was  
3 January 11, 2010. Huntington timely filed its list of witnesses and exhibits, amended it  
4 on January 14, 2010, and then filed a unilateral pretrial statement on January 19, 2010,  
5 alleging that Huntington's counsel had been unable to work with the Debtors to file a  
6 joint pretrial statement. On January 15, 2010, the Debtors filed a Notice of Filing Initial  
7 Disclosure Statement and Counterclaim ("Counterclaim"). The Counterclaim alleged  
8 that Huntington and its counsel had falsely alleged that Debtors have a contract with  
9 Huntington and falsely alleged that Debtors owed Huntington money. Debtors sought  
10 damages in the amount of \$139,926. The Counterclaim included requests for  
11 admission from Huntington and a request for production of documents.  
12

13  
14 A January 20, 2010, hearing was held on the Admissions Motion. At that  
15 hearing, Mr. Marrufo asserted that Huntington was not the "real party in interest," had no  
16 standing, and that Mr. Marrufo generally "object[ed] to everything up to this point." At  
17 the conclusion of the hearing, the court granted the Admissions Motion. An order to that  
18 effect was entered on January 21, 2010. Also, on January 21, 2010, Huntington filed a  
19 motion to strike the Counterclaim.  
20

21 Trial was conducted on January 25, 2010. Because the Debtors had not timely  
22 disclosed any witnesses or exhibits, they were not permitted to put on evidence. Their  
23 Counterclaim and accompanying discovery requests were also dismissed as having  
24 been untimely filed. Mr. Marrufo was, however, permitted to make argument and cross-  
25 examine all of Huntington's witnesses. At the conclusion of the trial, the court requested  
26 briefing from Huntington on the liability of Mrs. Marrufo and the Marrufos' community  
27  
28

1 property for Mr. Marrufo's action. On February 4, 2010, Huntington filed its brief  
2 asserting that it was not seeking a nondischargeability judgement against  
3 Mrs. Marrufo's sole and separate property; instead, it was seeking a determination that  
4 it was entitled to a nondischargeability judgment against Mr. Marrufo's sole and  
5 separate property as well as Debtors' marital community. The matter is now ready for  
6 decision.  
7

#### 8 9 IV. FACTS

10 In April 2007, Mr. Marrufo leased a 2007 Toyota Tundra pick up truck ("Toyota")  
11 from Desert Toyota in Tucson ("Desert Toyota"). The monthly lease payment was  
12 \$681. Desert Toyota assigned the contract to Huntington which financed the acquisition  
13 and obtained a purchase money security interest in the Toyota. The Debtors made  
14 regular monthly lease payments to Huntington until January 2008 when Mr. Marrufo  
15 requested a payoff figure from Huntington. Huntington provided Mr. Marrufo with a  
16 payoff figure of \$45,181.98.  
17

18 On February 27, 2008, Mr. Marrufo sent Huntington a letter and enclosed a  
19 check dated January 30, 2008, made payable to HBN Auto Exchange in the amount of  
20 \$45,181.98 (the "Check"). The Check was drawn on "TOCS, P.O. Box 1686,  
21 Birmingham, AL 35201." On or about February 14, 2008, Huntington and Mr. Marrufo  
22 executed a Bill of Sale, Release and Receipt ("Bill of Sale Exhibit") pursuant to which  
23 the Toyota was sold to Mr. Marrufo for \$45,181.98. On February 14, 2008, before the  
24 Check had cleared, Huntington released its lien on the Toyota and acknowledged in  
25 writing that its loan had been paid in full. As part of the payoff transaction, Huntington  
26  
27  
28

1 also refunded to Mr. Marrufo the sum of \$681 for excess payments. When Huntington  
2 submitted Debtors' Check for payment, it was returned to them as invalid (Exhibit 10).<sup>3</sup>

3 Following the release of the Toyota to Mr. Marrufo, he sold it to a third party and  
4 used some or all of the proceeds to purchase a Harley-Davidson motorcycle and a 1979  
5 pick up truck. Both of those vehicles were subsequently seized and forfeited to the  
6 Pima County and Tucson City police departments as part of a criminal investigation  
7 (Exhibit 2). On the trial date, Huntington had not recovered the Toyota or the  
8 \$45,181.98.  
9

## 10 11 12 V. ISSUES

- 13 1. Did Mr. Marrufo's tender of the check to Huntington deprive it of the  
14 Purchase Price and security interest in the Toyota and create a  
15 nondischargeable debt under §§ 523(a)(2), (4) and (6)?  
16 2. If so, is Huntington's debt excepted from Mr. Marrufo's discharge and from  
17 those protections that § 524(a)(3) provides to after acquired community  
18 property?  
19

## 20 21 VI. DISCUSSION

### 22 A. The Check was Counterfeit

23 This case centers on the Check that was returned to Huntington as an "invalid  
24 instrument." This is not, therefore, a "bad check" case where a debtor writes a check  
25

---

26  
27 <sup>3</sup> All exhibit references are to exhibits admitted into evidence at the trial.

1 but there are insufficient funds to pay it. In this case, the Check was a false document  
2 created to make it appear that the Debtor had a bank account and funds, which he did  
3 not, in fact, have. The Check, therefore, was counterfeit.<sup>4</sup>

4  
5 At trial, Mr. Marrufo denied that he had signed the Check.<sup>5</sup> Mr. Marrufo further  
6 argued under Federal Rule of Evidence 1003 that a duplicate of the Check should not  
7 have been admitted into evidence because the Check was “a masterful forgery.”  
8 (Transcript p. 67, ln 9).

9 In closing argument, Mr. Marrufo acknowledged that he had tendered a check to  
10 Huntington, but argued that the Check admitted into evidence was not the check he  
11 tendered because it had been altered by two stamps on the back (Transcript p. 77,  
12 lns 3-22). Those stamps consisted of a deposit stamp by Huntington and a stamp from  
13 Wachovia, which is where Huntington’s business representative testified that Huntington  
14 maintains an account (Transcript p. 31, lns 14-19). Therefore, Mr. Marrufo’s arguments  
15 that the Check was not the one that he tendered is not credible. Accordingly, the court  
16 finds that Mr. Marrufo did sign the Check, which was counterfeit, in order to obtain title  
17 to the Toyota free and clear of Huntington’s lien.  
18  
19  
20  
21

---

22 <sup>4</sup> According to Black’s Law Dictionary, counterfeit means to “unlawfully forge, copy or  
23 imitate an item, especially money or a negotiable instrument . . . or other officially issued items  
24 of value . . . with the intent to deceive or defraud by presenting the item as genuine.” BLACK’S  
25 LAW DICTIONARY 376 (8th ed. 2004). Forgery is defined in Black’s Law Dictionary as the act of  
26 fraudulently making a false document to be used as if its genuine. *Id.* at 677.

27 <sup>5</sup> Because the Admissions Motion was granted, Mr. Marrufo is deemed to have admitted  
28 that he signed the Check. However, the court is mindful of the fact that Mr. Marrufo was  
unrepresented by counsel throughout this adversary proceeding and, therefore, has relied on  
Mr. Marrufo’s statements at trial in deciding if Mr. Marrufo signed the Check.

1 Having made that factual finding, the court now turns to Huntington's request to  
2 have its debt declared nondischargeable pursuant to § 523(a)(2), (a)(4) and (a)(6).  
3 Huntington must prove that its claim is nondischargeable by a preponderance of the  
4 evidence under all three sections of the statute. Grogan v. Garner, 498 U.S. 279, 291  
5 (1991).  
6

7 1. Tender of the Check Constitutes Grounds for Denial of Discharge Under  
8 § 523(a)(2)(A)

9 In order to prevail under a § 523(a)(2)(A) claim for false representation,  
10 Huntington must demonstrate that: (1) Mr. Marrufo "obtained money through a material  
11 misrepresentation" that he knew was false, (2) that he intended to deceive Huntington,  
12 (3) that Huntington justifiably relied on the false representation; and (4) that  
13 Huntington's reliance was the proximate cause of its loss. All four elements have been  
14 met here. The evidence demonstrates that Mr. Marrufo knowingly tendered the fake  
15 Check with the intent of receiving title to the Toyota free and clear of Huntington's lien.  
16 Huntington justifiably relied on the Check, which appeared to be a normal check with  
17 normal routing numbers and other indicia of an ordinary check (Transcript p. 53, Ins 6-  
18 12).<sup>6</sup> As a result of Huntington's reliance, it lost its security interest in the Toyota. In the  
19 alternative, tender of the Check to deprive Huntington of \$45,181.98 constituted actual  
20 fraud, which is broader than misrepresentation. In re Corder, 299 B.R. 462, 465 (Bankr.  
21  
22

---

23  
24 <sup>6</sup> In Field v. Mans, the Supreme Court ruled that a creditor needed only to prove that it  
25 justifiably relied on a representation, not that the creditor's reliance on that representation was  
26 objectively reasonable. 116 U.S. 59, 70-73 (1995). Under Justice Souter's explanation of  
27 justifiable reliance for example, a buyer may be justified when he or she relies on a seller's  
statement that land is free of encumbrances "even if he could have 'walk[ed] across the street to  
the office of the register of deeds in the courthouse' and easily have learned of an unsatisfied  
mortgage." *Id.* quoting RESTATEMENT (SECOND) OF TORTS § 540, cmt. b, illus. 1 (1976).



1 S.D. Ohio 2003) *citing* Mellon Bank, N.A. v. Vitanovich (In re Vitanovich), 259 B.R. 873,  
2 877 (6th Cir. B.A.P. 2001); Citibank v. Eashai, 87 F.3d 1082, 1086 (9th Cir. 1996).

3 Indeed, as noted earlier the definitions of counterfeit and forgery encompass an intent to  
4 defraud. State v. Thompson, 981 P.2d 595, 597 (Ariz. Ct. App. 1999). Similarly, forgery  
5 is defined as the act of fraudulently making a false document. *Id.* at 596. Huntington  
6 has, therefore, satisfied the requirements of § 523(a)(2)(A).

8 2. Section 523(a)(4)

9 Huntington argues that presentation of the Check constituted larceny under  
10 applicable Arizona law. However, a bankruptcy court in applying § 523(a)(4) is “not  
11 bound by the state law definition of larceny but, rather may follow federal common law,  
12 which defines larceny as a felonious taking of another’s personal property with intent to  
13 convert it or deprive the owner of the same.” Ormsby v. First Am. Title Co., 591 F.3d  
14 1199, 1205 (9th Cir. 2010). The Ormsby court defined the term felonious as  
15 “proceeding from an evil heart or purpose; malicious, villainous . . . wrongful; done  
16 without excuse of color or right.” Mr. Marrufo’s tender of the false Check falls within the  
17 federal common law definition of larceny and, accordingly, Huntington is entitled to relief  
18 pursuant to § 523(a)(4).

21 3. Section 523(a)(6)

22 In order to prevail under § 523(a)(6), Huntington must prove both willful and  
23 malicious injury. See Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002).  
24 Willful injury requires either subjective motive to inflict injury or belief that injury is  
25 substantially certain to result from the conduct. *Id.* at 1142. The conversion of a  
26 property subject to a creditor’s security interest has been found to constitute a willful  
27

1 injury under § 523(a)(6). See In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992).

2 Huntington has, therefore, demonstrated that Mr. Marrufo's scheme to deprive  
3 Huntington its security interest was willful.

4 Malicious injury: (1) requires a wrongful act; (2) done intentionally; (3) which  
5 necessarily causes injury; and (4) is done without just cause or excuse. Petralia v.  
6 Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001). Here, Mr. Marrufo tendered the Check  
7 intentionally knowing that it would necessarily cause injury (the loss of Huntington's  
8 money and its security interest in the Toyota), and was done without just cause or  
9 excuse. Accordingly, Huntington is entitled to a determination that the debt is  
10 nondischargeable pursuant to § 523(a)(6).

11  
12  
13 4. The Scope of the Nondischargeability Determination

14 At the conclusion of the trial, the court requested additional briefing from  
15 Huntington about the scope of any nondischargeability judgment which might be  
16 entered based upon the fact that the evidence demonstrated that all of the  
17 representations and actions taken with respect to the tender of the Check were those of  
18 Mr. Marrufo and were taken after the purchase of the Toyota. Huntington responded by  
19 filing a brief acknowledging that it was not seeking a nondischargeable judgment  
20 against Mrs. Marrufo's sole and separate property, but that it was seeking a  
21 nondischargeability judgment against Mr. Marrufo and the community property of Betty  
22 and Alberto Marrufo. Huntington relied primarily upon the case of In re Rollinson,  
23 322 B.R. 879, 880 (Bankr. D. Ariz. 2005) to support its claim that once a community  
24 debt is determined to be nondischargeable as to one spouse, it is also  
25 nondischargeable as to their community property. Huntington argues that because the  
26  
27  
28

1 original obligation to acquire the Toyota was a community debt and because the amount  
2 that Huntington seeks to have declared nondischargeable is the balance due on that  
3 community debt, that Huntington's claim is a community claim excepted from discharge  
4 and not subject to the injunction of § 524(a)(3).  
5

6 As has been established above, the debt is nondischargeable under a number of  
7 § 523 provisions. The question for this court, then, is whether the debt was a  
8 community debt. If it was, then under the rationale of Rollinson the debt should be  
9 nondischargeable as to the entire community; if not, then it is only nondischargeable as  
10 to Mr. Marrufo.  
11

12 Under Arizona community property law, the court should presume that a debt  
13 entered into contractually is a community debt. *E.g.*, Morgan v. Bruce, 259 P.2d 558,  
14 560-61 (Ariz. 1953). As Mr. and Mrs. Marrufo have not submitted any evidence to rebut  
15 the presumption, this court will presume that the contractual debt to pay for the Toyota  
16 was a community debt. That contracted for debt, however, is not the debt which the  
17 court has found to be nondischargeable. The nondischargeable debt is that debt  
18 created by Mr. Marrufo's tender of the counterfeit Check.  
19

20 In contrast to contracted-for debts, , there is no presumption that a debt incurred  
21 through one spouse's tort is a debt chargeable to the community under Arizona  
22 community property law. *E.g.*, Garret v. Shannon, 476 P.2d 538, 539-40 (Ariz. Ct. App.  
23 1970). In order for this court to hold the community liable for Mr. Marrufo's tortious acts,  
24 Huntington must establish that Mr. Marrufo's overall purpose in committing the tort was  
25 to benefit the community, Hays v. Richardson, 386 P.2d 791, 792-93 (Ariz. 1963).  
26  
27  
28

1 Huntington failed to do this. Indeed, the testimony of one of Huntington's witnesses<sup>7</sup>  
2 indicates that Mrs. Marrufo did not understand why Mr. Marrufo sold the Toyota and that  
3 the overall community was not benefitted by Mr. Marrufo's tender of the Check. In any  
4 event, Huntington did not offer any evidence that Mrs. Marrufo participated in the  
5 scheme or any other evidence that the community benefitted from Mr. Marrufo's tort. As  
6 such, the debt was not a community debt, and Rollinson's holding is inapplicable.  
7 Accordingly, Huntington is entitled solely to a nondischargeable judgment against  
8 Mr. Marrufo.  
9

## 10 11 VII. CONCLUSION 12

13 The foregoing constitutes the court's findings of fact and conclusions of law  
14 pursuant to Rule 7052. A judgment in the amount of \$45,181.98 with interest to accrue  
15 at the federal judgment rate will be effective this date.<sup>8</sup>  
16

17 Dated and signed above.

18 Notice to be sent through the  
19 Bankruptcy Noticing Center "BNC"  
20 to the following:

21 Alberto Gonzalez Marrufo  
22 Betty Martinez Marrufo  
23 c/o 6502 East Calle Altair  
24 Tucson, AZ 85710

---

25 <sup>7</sup> Detective Baldwin of the Tucson Police Department. See Transcript at pages 11-12.

26 <sup>8</sup> The amount of the judgment was calculated as follows: \$45,181.98, which is the  
27 presumptive value of the truck, plus interest at the federal judgment rate as specified by  
28 28 U.S.C. § 1961 of 0.43%. Because the nondischargeable debt is based on Mr. Marrufo's  
tortious conduct, Huntington is not entitled to its contractual interest rate nor attorneys' fees.

1 Albert Gonzalez Marrufo  
2 Betty Martinez Marrufo  
3 General Delivery  
4 Tucson, AZ 85726

5 Gerard R. O'Meara  
6 Matthew A. Goldstein  
7 Gust Rosenfeld PLC  
8 1 South Church Ave. #1900  
9 Tucson, AZ 85701  
10 Attorneys for The Huntington National Bank

11 Beth Lang  
12 Chapter 7 Trustee  
13 1955 West Grant Rd. #125  
14 Tucson, AZ 85745

15 U.S. Trustee's Office  
16 230 North First Ave. #204  
17 Phoenix, AZ 85003  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28